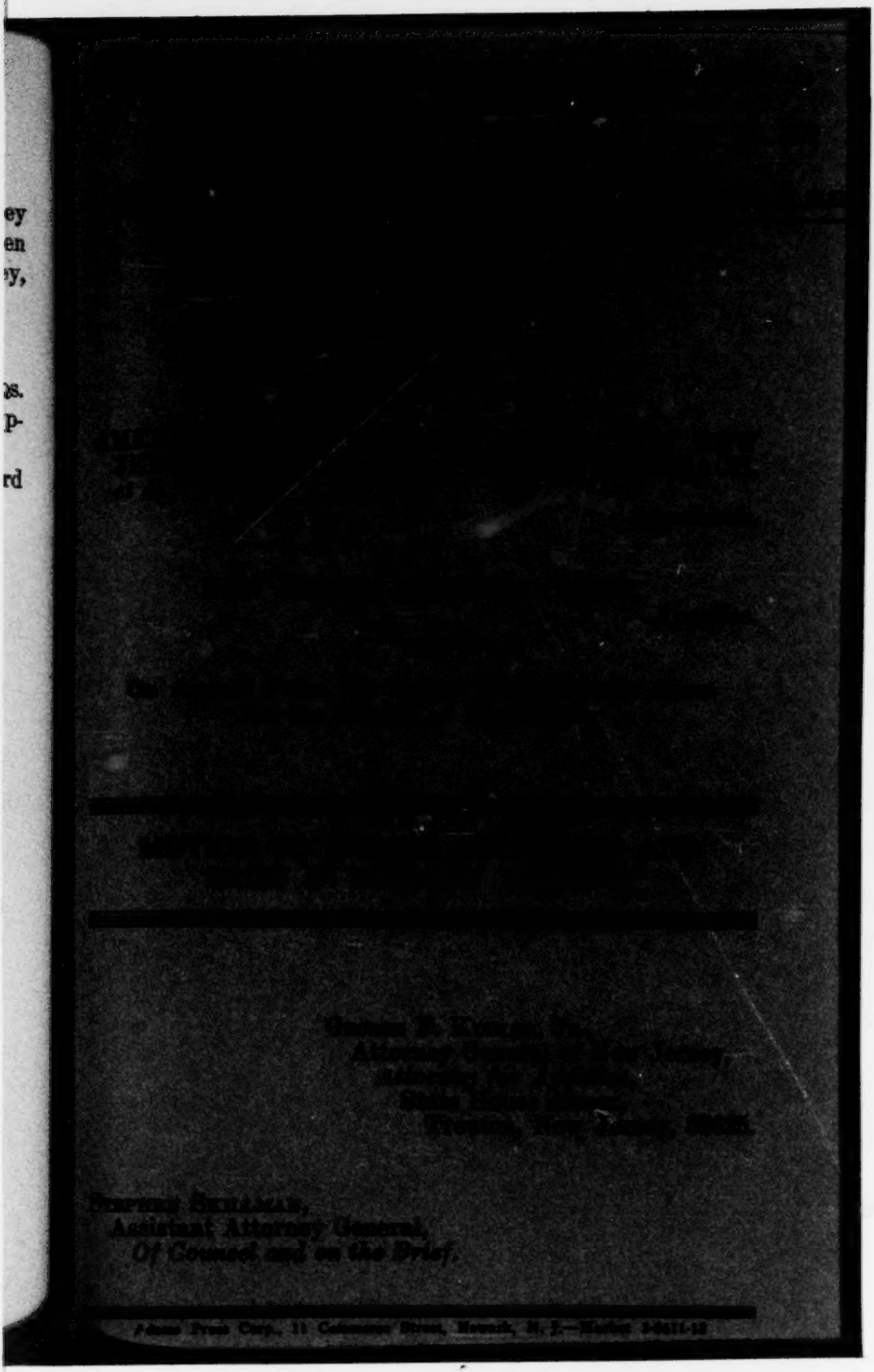

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1972

**No. 691**

AMERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH, *et al.*, PHILIP G. AUERBACH, *et al.*,

*Appellants,*

*v.*

NEW JERSEY SUPREME COURT,

*Appellee.*

**On Appeal From the United States District Court for the District of New Jersey**

## MOTION TO DISMISS OR AFFIRM

The appellee moves to dismiss the appeal pursuant to Rule 16(1)(a) on the ground that the Court lacks jurisdiction under 28 U.S.C. § 1253; or in the alternative, the appellee moves to affirm the judgment of dismissal of the District Court for the District of New Jersey pursuant to Rule 16(1)(c) on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## Questions Presented

1. Is a substantial federal constitutional question which confers jurisdiction on a three-judge court pursuant to 28 U.S.C. § 2281 presented by the adoption of a rule of court regulating contingent fee arrangements in tort litigation?

2. Did the three-judge court abuse its discretion in ordering dismissal on grounds of abstention of an action brought by members of the state bar against the Supreme Court of New Jersey to invalidate a rule of court adopted to regulate the practice of law within the state?

## Statement of the Case

The Supreme Court of New Jersey, pursuant to its authority under the New Jersey Constitution* regarding the administration of the courts and the regulation of the practice of law, adopted a rule of court regulating the use of contingent fee arrangements in tort litigation. N.J.R. 1:21-7. The rule requires an attorney, before entering into a contingent fee arrangement, first to afford the client an opportunity to retain him under an arrangement providing for compensation on the basis of the reasonable value of services rendered. N.J.R. 1:21-7(b). The rule further provides that an attorney shall not contract for or collect

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* The pertinent section of the New Jersey Constitution provides:

> "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." N. J. Const., Art. 6, § 2, para. 3.

a contingent fee for handling a tort claim which is in excess of:

"(1) 50% on the first $1,000 recovered;

(2) 40% on the next $2,000 recovered;

(3) 33⅓% on the next $47,000 recovered;

(4) 20% on the next $50,000 recovered;

(5) 10% on any amount recovered over $100,000; and

(6) where the amount recovered is for the benefit of an infant or incompetent and the matter is settled without trial the foregoing limits shall apply, except that the fee on any amount recovered up to $50,000 shall not exceed 25%."

N.J.R. 1:21-7(c).

N.J.R. 1:21-7(f) provides that if an attorney considers the fee permitted by paragraph (c) to be inadequate, an application on written notice to the client may be made at the conclusion of the matter to have the Assignment Judge determine a reasonable fee in light of all the circumstances. The court has indicated by administrative directive that a provision reserving the right to proceed under N.J.R. 1:21-7(f) should be included in the contingent fee agreement.

The American Trial Lawyers, New Jersey Branch, et al. (hereinafter American Trial Lawyers) and the Trial Attorneys of New Jersey, et al. (hereinafter Trial Attorneys) brought actions in the United States District Court for New Jersey challenging the validity of N.J.R. 1:21-7(c) on the grounds that the Supreme Court of New Jersey lacks authority under the New Jersey Constitution to

adopt such a rule and that it is violative of various provisions of the United States Constitution. The complaints demanded both preliminary and permanent injunctive relief against the operation of the rule. Recognizing that the court's rule was legislative in nature, the original complaint of the American Trial Lawyers sought the convening of a three-judge court pursuant to 28 U.S.C. § 2281.

The Attorney General of New Jersey, representing the Supreme Court of New Jersey, filed motions to dismiss the complaints for lack of jurisdiction on the grounds that they present no substantial federal claim. *Rosado* v. *Wyman,* 397 U. S. 397 (1970). The brief in support of the motion also agreed with the American Trial Lawyers original contention that the case would fall under § 2281 if a substantial constitutional claim were presented.

The single federal district court judge before whom the motion to dismiss was brought referred the matter to Chief Judge Seitz of the Third Circuit Court of Appeals for the convening of a three-judge court. No formal order denying the motion to dismiss nor opinion thereon was filed. A three-judge court was convened and, after oral argument, the court in a short *per curiam* opinion dismissed the complaint on grounds of abstention. A motion by the plaintiffs to alter or amend the judgment was denied and an appeal was then taken to this Court.

## *ARGUMENT*

## POINT I

**The Court lacks jurisdiction of the appeal under 28 U.S.C. § 1253, because the appellants' complaints failed to present a substantial federal constitutional question and the three-judge district court was therefore without jurisdiction under 28 U.S.C. § 2281.**

The jurisdiction of the Court to hear this appeal is rested upon 28 U.S.C. § 1253, which provides for direct appeal from any order granting or denying an injunction in a civil action required to be heard by a three-judge district court. It is well established that the Court has jurisdiction to hear an appeal pursuant to § 1253 only if the case was in fact required to be heard by a three-judge court. *Bd. of Regents of the University of Texas System* v. *New Left Education Project,* 404 U. S. 541 (1972); *Bailey* v. *Patterson,* 369 U. S. 31 (1962). It is also clear that 28 U.S.C. § 2281 does not confer jurisdiction on a three-judge court if no substantial federal constitutional claim is presented. *Bailey* v. *Patterson, supra; Ex parte Poresky,* 290 U. S. 30 (1933). Therefore, the appellants must demonstrate that the complaints filed in the district court present a substantial federal constitutional claim in order to establish the Court's jurisdiction to hear the appeal. *Bailey* v. *Patterson, supra.*

The complaints set forth a series of federal constitutional claims in "shotgun" form. The appellee contends, as it did before the court below, that none of these claims are substantial. The decision of the single federal district court judge to request the convening of a three-judge court had to be grounded on the conclusion that a sub-

stantial federal constitutional claim was presented. Similarly, as the court stated in *Idlewild Bon Voyage Liquor Corp.* v. *Rohan,* 289 F. 2d 426, 429 (2nd Cir. 1961) *aff'd* 370 U. S. 713 (1962), the decision of the three-judge district court to abstain ". . . [presupposed] that the court [had] jurisdiction to decide the controversy." But neither the single district court judge nor the three-judge panel issued an opinion pointing to any specific constitutional claim which it concluded was substantial. Furthermore, the appellants' jurisdictional statement does not discuss the substantiality of the constitutional claims advanced, even though the jurisdiction of the Court depends on such a showing. It is necessary, therefore, to discuss briefly each one of the claims presented by the appellants to the district court.

The appellants seemed to rely primarily on substantive due process grounds in challenging the contingent fee rule. The rule is an economic regulatory measure, since its purpose is to prevent attorneys from charging contingent fees in excess of what the Supreme Court of New Jersey has determined to be fair. Such measures are presumed to be constitutional unless shown to be inconsistent with some specific constitutional prohibition. *Ferguson* v. *Skrupa,* 372 U. S. 726, 730-731 (1963). Consequently, an economic regulatory measure will not be set aside unless no set of facts can be reasonably conceived to justify it. *McGowan* v. *Maryland,* 366 U. S. 420 (1961). These recognized principles of judicial deference to legislative judgments in the area of economic regulation are reflected in a long line of cases sustaining statutes regulating businesses and profession, including ones which place limitations on prices and fees. See *e.g. Olson* v. *Nebraska,* 313 U. S. 236 (1941) (statute limiting the amount charged by a private employment agency to 10% of cli-

ents' first month's wage); *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251 (1931) (statute limiting an insurance agent's commission on a fire policy); *Block* v. *Hirsh*, 256 U. S. 135 (1921) (statute limiting rents in housing shortage); *Griffith* v. *Connecticut*, 218 U. S. 572 (1910) (statute setting maximum interest rates on loans). In fact, the Court has sustained outright prohibitions of commercial enterprises deemed to be inimical to the public interest. See *e.g. Ferguson* v. *Skrupa*, 372 U. S. 726 (1963) (statute making it a misdemeanor for any person to engage in the business of "debt adjusting" except as an incident to the practice of law).

The constitutionality of provisions establishing maximum charges for legal services are governed by these same principles. It is well established that the states, through their judiciaries, have broad power to regulate the practice of law. *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U. S. 154 (1971); *Lathrop* v. *Donohue*, 367 U. S. 820 (1961). This regulatory power may be exercised to limit attorneys' fees, particularly to guard against the dangers inherent in contingent fee arrangements, which have been deemed substantial enough to merit their outright prohibition in other common law countries as well as on the continent. See Taggart, *Are Contingent Fees Ethical Where Client is Able to Pay a Retainer*, 20 Ohio St. L. J. 329, 336 (1959). In recognition of the strong public interest in the fee relationships between attorney and client, the Court has sustained a wide range of provisions adopted to protect clients from being charged excessive fees. *Randolph* v. *U. S.*, 274 F. Supp. 200 (M. D. N. C. 1967), *aff'd* 389 U. S. 570 (1968); *Margolin* v. *U. S.*, 269 U. S. 93 (1925); *Yeiser* v. *Dysart*, 267 U. S. 540 (1925); *Calhoun* v. *Massie*, 253 U. S. 170 (1920). See also *Gair* v. *Peck*, 6 N. Y. 2d 97, 188 N. Y. Sup. 2d 491, 160

N. E. 2d 43, 77 A.L.R. 2d 390 (1959) *on motion for reargument,* 6 N. Y. 2d 983, 191 N. Y. Supp. 2d 951, 161 N. E. 2d 736 (1959), *appeal dismissed* and *cert. den.,* 361 U. S. 374 (1960). Therefore, the constitutionality of limitations upon contingent fees is now so well established that the challenge to the contingent fee rule adopted by the Supreme Court of New Jersey is frivolous and insubstantial.

In addition to their substantive due process claims, the appellants also urged that the contingent fee rule denies equal protection of law by regulating contingent fee contracts in tort cases without imposing similar restrictions on contingency agreements alleged to exist in other areas of practice. The burden which a party must meet in challenging an economic regulatory measure on equal protection grounds is comparable to that governing substantive due process claims. As the Court stated in *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955):

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Applying these principles to the present case, there can be no doubt as to the constitutionality of the Supreme Court of New Jersey establishing a schedule of maximum contingent fees in tort actions without imposing a similar requirement with respect to other areas of practice where contingent fee arrangements are allegely employed. First,

if the use of contingent fee arrangements in other areas were brought to the attention of the court, it might find that public policy would be offended by allowing any contingency arrangements at all. Secondly, contingency arrangements in other areas of practice may involve different considerations. The court might conclude, for example, that commercial enterprises which retain attorneys to do collection work have bargaining strength equal to that of the attorney and therefore do not require the protection of maximum fee schedules. Most importantly, tort actions comprise the largest area of civil litigation, vitally affecting not only litigants but also the public at large who must pay the costs of increased insurance premiums and court congestion requiring the appointment of more judges. It is also the area where the use of contingency arrangements is most well known. These factors lead to the clear conclusion that the Equal Protection Clause does not require every area in which a contingent fee might be permitted to be explored in order to decide that there must be appropriate regulation in the tort area.

The appellants also have attempted to assert the alleged constitutional right of potential clients to retain counsel as a basis for invalidation of the contingent fee rule. However, it is a firmly established principle of constitutional law that parties have standing to assert only constitutional rights which are personal to themselves. *Tileston* v. *Ullman,* 318 U. S. 44 (1943). This principle applies with particular force when a party seeks to assert the constitutional rights of others whose interests are inherently conflicting with his own in regard to the subject of the constitutional challenge. *See e.g. Erie R.R. Co.* v. *Williams* 233 U. S. 685 (1914) (employer lacks standing to challenge labor law on the grounds that the law deprives its employees of liberty without due process of

law); *Collins* v. *Texas,* 223 U. S. 288 (1912) (osteopath lacks standing to challenge medical licensing statute on the grounds that it denies the constitutional rights of the followers of Christian Science). Since the reason for the contingent fee rule is the protection of the public from the exaction of excessive legal fees by attorneys, the appellants do not have standing to assert the adverse interest of potential clients.

A further reason, intimately related to standing, why the Court should not entertain any challenge to the rule based on the alleged interests of potential clients is the well established principle that the federal courts will not entertain abstract, hypothetical attacks on the constitutionality of statutes. *Laird* v. *Tatum,* 408 U. S. 1 (1972); *Watson* v. *Buck,* 313 U. S. 387 (1941). It is difficult to imagine a more abstract and hypothetical constitutional claim than the appellants' allegation that the rule will deny members of the public access to court. There is no one before the court who claims that the rule has deprived him of the opportunity to file suit or to retain an attorney and, on any realistic analysis, it must be concluded that it is highly unlikely this will occur. It is highly improbable that the rule would ever prevent a member of the public from retaining an attorney on a contingent fee basis since, according to the appellants' own allegations, it does not affect the fees now normally charged on the first $50,000 of recovery (which under the rule may amount to $16,966), and it permits fees of 20% on the additional recovery from $50,000. to $100,000. and 10% on the recovery in excess of $100,000. If these rather generous maximums were to prove inadequate in a particular case, the attorney could of course apply for a greater fee pursuant to R. 1:21-7(f). The attempt to assert the hypothetical interests of unspecified members of the public is therefore completely lacking in substance.

The Trial Attorneys also urged before the district court that the assertion by the Supreme Court of New Jersey of the authority under the New Jersey Constitution to adopt the rule is plainly incorrect and therefore violates the Due Process Clause of the Fourteenth Amendment. This argument, however, is fundamentally inconsistent with the basic principle of our federal system that the interpretation of a state statute by a state's highest court is binding upon the federal courts including the Supreme Court of the United States. *Shuttleworth* v. *Birmingham,* 382 U. S. 87, 91 (1965); *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 432 (1963). This is true no matter how strained the federal court may feel the state court's interpretation to be. As the Court said in *N.A.A.C.P.* v. *Button*:

> "For us, the words of Virginia's highest court are the words of the statute." 371 U. S. at 432.

In fact, the Court has expressly rejected the Trial Attorneys' argument that the Due Process Clause confers authority on the federal courts to review interpretations of state law by state courts:

> "Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law." *Hebert* v. *State of Louisiana,* 272 U. S. 312, 316 (1926).

Therefore, the Trial Attorneys' contention that the federal courts should construe the New Jersey Constitution to determine whether there is authority in state law for the adoption of the rule is plainly frivolous.

The appellants also urged before the district court that the rule is invalid because no trial-type hearing was held in advance of its adoption. However, this contention is plainly contrary to well-established authority holding that legislative measures, including the rules of administrative agencies, may be adopted without a hearing. See *e.g. Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176 (1935); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933); *Assigned Car Cases*, 274 U. S. 564, 583 (1927); *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441 (1915); *Munn* v. *People of Illinois*, 94 U. S. 113 (1876). It should be added that any attorney who feels the schedule does not provide fair compensation in his particular situation may apply pursuant to R. 1:21-7(f) to have the court set a fee which is reasonable "in light of all the circumstances." It is the hearing on such an application, rather than the adoption of the rule, which properly may be analogized to a rate proceeding before a Public Utility Commission.

The appellants also claimed that the rule, insofar as it applies to contingent fee contracts entered into before it was adopted, impairs the obligation of contracts in violation of Article I, § 10 of the United States Constitution. To put the retroactivity claim in proper prospective, it should be noted that the rule does not represent the first instance where the state judiciary has regulated contingency arrangements. Contracts for contingent fees have always been subject to judicial disapproval. See *Hughes* v. *Eisner*, 14 N. J. Super. 58 (App. Div. 1951), *appeal dismissed* 8 N. J. 228 (1951); *Littlefield* v. *Kearns*, 5 N. J. Super. 68 (App. Div. 1949). The rule properly may be viewed, therefore, as simply a more efficient procedural mechanism for the discharge of a responsibility which

always has been reposed in the judiciary. Thus viewed, there can be no substantial argument that the rule impairs contracts in violation of constitutional principles, even assuming *arguendo* that such claims have not been mooted by the passage of time since the adoption of the rule. The Court has held, accordingly, that legislation limiting the compensation of attorneys in the prosecution of claims against the government is valid as to contracts which have been entered into before its passage. *Ball* v. *Halsell*, 161 U. S. 72, 82-84 (1896). In that case the Act limiting contingent fees was passed 17 years *after* the date the attorney entered into the fee contract and *after* he had performed important services under the contract. Similarly, in *Calhoun* v. *Massie*, *supra*, the Court held that the prohibition in the Omnibus Claims Act of 1915 against the "collection or receipt of any compensation in excess of 20%" applied to a contingent fee contract entered into before the date of its enactment. The insubstantiality of any claim of unconstitutionality as a result of retroactive application of the rule is further underscored by the fact that any attorney who claims the rule has operated unfairly as to him can challenge its retroactivity features in an application for the allowance of greater fees pursuant to R. 1:21-7(f).

The appellants further claimed before the district court that the rule, as applied to litigation in federal court, was invalid, because the regulation of legal fees in federal court has been pre-empted by federal statutes such as the Jones Act and Federal Employers Liability Act. However, this contention, even if meritorious, involves only an alleged conflict with federal statutes grounded in the Supremacy Clause, which does not confer jurisdiction on a three-judge court pursuant to 28 U.S.C. § 2281. *Swift & Company* v. *Wickham*, 382 U. S. 111 (1965). This contention, therefore, cannot be relied upon as a basis for the Court's jurisdiction to hear this appeal.

## POINT II

**The district court did not abuse its discretion in dismissing on grounds of abstention, because the delicate relationship between the parties and the undesirability of a lower federal court reviewing the regulation of the practice of law by a state supreme court are proper reasons for requiring the appellants to litigate their claims in state court.**

Preliminarily, it is the position of the appellee that if a substantial constitutional question is presented, the three-judge court had jurisdiction under 28 U.S.C. § 2281 and hence the Court has jurisdiction of the appeal under 28 U.S.C. § 1253. It has long been clear that the applicability of the three-judge court requirement turns on the legislative character of state action, rather than the identity of the body which has adopted a legislative measure. The enactment of the predecessor of § 2281 in 1910 was a reaction to the then widespread resort by economic interests, such as railroads, to the injunctive power of the federal courts to impede the implementation of state economic regulations, including the rules of state administrative bodies such as Public Utility Commissions. Currie, *The Three-Judge District Court in Constitutional Litigation,* 32 U. of Chi. L. Rev. 1, 4-8 (1964). Thus, when a question arose as to whether the requirement for the convening of a three-judge court applied if a party sought to enjoin an order of a state administrative agency, as distinguished from an enactment of a state legislature, the law was amended to make this intention clear. 37 Stat. 1013 (1913). However, the Court later indicated that the amendment had been superfluous, since the original statute, while it did not expressly mention orders of administrative agencies, nevertheless covered them. *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 292 (1923).

The intention of § 2281 to provide a state with the protection afforded by three judges whenever the constitutionality of its legislative acts are drawn in question, irrespective of the particular body which has adopted the act, was reiterated twenty years later in *Phillips* v. *United States,* 312 U. S. 246 (1941) and *American Federation of Labor* v. *Watson,* 327 U. S. 582 (1946), where the Court found the predecessor to § 2281 to apply to an attack on the constitutionality of a State Constitution. In *American Federation of Labor* v. *Watson,* the Court said:

> "It would . . . be somewhat incongruous to hold that a single judge, while prohibited from enjoining action under an act of the state legislature, would be free to act if the state constitution alone were involved. The policy underlying § 266 admits no distinction between state action to enforce a constitutional provision and state action to enforce an act of the legislature. There is no suggestion in the history of § 266 that Congress was willing to give the federal courts a freer hand when state constitutional provisions were involved. In our view the word 'statute' in § 266 [the predecessor to § 2281] is a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions." 327 U. S. at 592-593.

The rule adopted by the Supreme Court of New Jersey to regulate excessive contingent fees in tort actions is certainly the kind of legislative measure of general statewide application which § 2281 was designed to govern. The rule regulates fee arrangements between all members of the New Jersey Bar and any member of the public who

might someday seek to retain the services of a New Jersey attorney to bring a tort action. No one would question the applicability of § 2281 if a professional board within the executive branch of government were to enact a similar rule with regard to the profession it was charged with regulating and the constitutionality of the rule were challenged in federal court. Yet the regulation by the Supreme Court of New Jersey of the practice of law stands on a higher plateau than regulation by a state administrative agency, since the court, like the legislature, draws its regulatory power directly from the State Constitution, whereas a state agency only has such power as the legislature delegates to it. See *Law Students Civil Rights Research Council* v. *Wadmond*, 299 F. Supp. 117, 127-128 (S. D. N. Y. 1969) *aff'd* 401 U. S. 154 (1971), where Judge Friendly, speaking for the court, stated that an alternative grounds for convening a three-judge court was that a rule of general applicability adopted by a character committee acting under the supervision of the New York Appellate Division was a "statute" within the meaning of § 2281. See also *Lathrop* v. *Donohue, supra*, at 824-827. Furthermore, conflicts between the federal and state judiciaries are among the most sensitive in federal-state relations (*see Younger* v. *Harris*, 401 U. S. 37 (1971)), so the policies which underlie § 2281 are strongly implicated when the constitutionality of a rule adopted by a state's highest court is challenged in federal court. In fact, as the court below held, the area is so sensitive that even a three-judge court should seek to refrain from intruding into the regulation of the practice of law by a state supreme court. Therefore, to find § 2281 applicable where the constitutionality of a rule of a state agency is attacked but inapplicable where a rule has been adopted by a state supreme court pursuant to a direct grant of power under the State Constitution would be the same kind of "incongruous" result

which the Court construed § 2281 to avoid in *American Federation of Labor* v. *Watson, supra.* Therefore, if a substantial constitutional claim is presented, the Court has jurisdiction to review the decision of the district court to dismiss on grounds of abstention.

There are two important interests which are served by a federal court abstaining from deciding a matter raising federal constitutional questions and deferring instead to the state courts. First, by permitting the state courts to process the dispute, ". . . a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny* v. *Frank Mashuda Co.,* 360 U. S. 185, 189 (1959). Second, abstention is appropriate ". . . on grounds of comity with the states when the exercise of jurisdiction by the federal court would disrupt a state administrative process . . ., or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies." Id.

In the first class of cases, where abstention is ordered solely to secure a state court determination on an issue of state law, the usual practice is for the federal court to stay proceedings pending adjudication by the state court. *Lake Carriers' Assoc.* v. *MacMullan,* 406 U. S. 498 (1972). There is no hard and fast rule that the federal court must retain jurisdiction in such cases, however, and on occasion dismissal has been ordered. See *e.g. Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368 (1949). In the second class of cases, where abstention is ordered to avoid interference with state activities, it is appropriate for the court to dismiss the action rather than to retain jurisdiction. *Alabama Public Service Comm.* v. *Southern Railway Co.,* 341 U. S. 341 (1951); *Burford* v. *Sun Oil Co.,* 319 U. S. 315 (1943). See also *Koehler* v. *Ogilvie,* 53 F.R.D. 98 (N. D.

Ill. 1971) *aff'd* 405 U. S. 906 (1972); *Urbano* v. *Board of Managers of New Jersey State Prison,* 415 F. 2d 247 (3rd Cir. 1969), cert. den. 397 U. S. 948 (1970); *Press* v. *Pasadena Independent School Dist.,* 326 F. Supp. 550 (S. D. Tex. 1971); Wright, *Federal Courts,* § 52, p. 200 (2d Ed. 1970).

The decision of the district court to abstain was based on both the presence of issues of state law, the resolution of which might obviate the need to rule on federal constitutional issue, and the undesirability of a lower federal court intruding into the delicate relationship which exists between members of the Bar and the state's highest court. A careful reading of the opinion leaves no doubt that the later consideration weighed heavily upon the court:

> "Essentially the case poses a dispute between a state's highest court and those persons authorized by that court to practice law in the state. The relationship between the parties thus is an extremely delicate one. Under such circumstances federal courts generally have considered it appropriate, before attempting any direct federal intervention at the outset, first to permit the state courts to process the dispute." (A2 to A3).

Where the grounds for abstention are in part the presence of an unresolved question of state law and in part the avoidance of the needless friction which might result from enjoining state officials from executing domestic policies, the case should be treated as the latter type and the appropriate disposition, as was ordered here, is dismissal. See *Koehler* v. *Ogilvie, supra; Barrett* v. *Atlantic Richfield Co.,* 444 F. 2d 38, 44-46 (5th Cir. 1971).

Assuming, in light of its denial of the motion to alter or amend the judgment, that the district court intended

the dismissal to be with prejudice, this disposition was a a sound exercise of discretion in view of the nature of the litigation. As the district court appropriately observed, the relationship between the members of the bar and the court responsible for regulating their professional conduct "is an extremely delicate one." It is also true, as seems to have been implicitly recognized by the district court, that the relationship between a state's supreme court and the lower federal judiciary, particularly with regard to the state court's regulation of the practice of law, is an extremely delicate one. See *Younger* v. *Harris, supra; Koehler* v. *Ogilvie, supra.* Furthermore, the determination that the entire controversy should be heard by the state courts in no way precludes the appellants from advancing any federal constitutional claims they may have, with the opportunity for ultimate review thereon by this Court. In fact, this has been the procedure generally followed in the leading cases involving challenges to the actions of state supreme courts in regulating the practice of law. See *e.g. Lathrop* v. *Donohue, supra; Cohen* v. *Hurley,* 366 U. S. 117 (1961). It is therefore submitted that it is appropriate within the federal judicial system for the Supreme Court of the United States, rather than any lower federal court, to review the actions of a state supreme court which deal with the regulation of the practice of law.

It is also significant in this particular case that the appellants challenge the constitutionality of the contingent fee rule on its face, rather than the manner in which it has been or might be administered. Therefore, the concern expressed by the Court in *England* v. *Louisiana Board of Medical Examiners,* 375 U. S. 411, 416 (1964) for a party's right to ". . . the benefit of a federal trial court's role in constructing a record and make fact find-

ings" does not seem applicable to this controversy. This case also involves the rather unusual circumstance that the appellants have advanced claims in state court nearly identical to those forming the basis of their federal action, except that the claims in state court are advanced not under the United States Constitution but rather under the parallel due process, equal protection and obligation of contract provisions of the New Jersey Constitution. By proceeding in this fashion, the appellants themselves have elected to litigate issues in state court comparable in scope to those which they claim the right to later re-litigate in federal court. This does not appear to be what was contemplated by the Court's opinion in *England* v. *Louisiana Board of Medical Examiners.*

For these reasons, the dismissal of the action by the federal district court was a sound exercise of discretion which does not warrant further review by the Court.

## CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of jurisdiction, the judgment of the three-judge court should be vacated and the matter should be remanded to the single federal district court judge. In the alternative, if the Court determines that a substantial constitutional claim is presented, it is respectfully submitted that the judgment of the district court dismissing the complaint on the ground of abstention should be affirmed.

Respectfully submitted,

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